77-243

SUPREME COURT, U. S.
FILED
AUG 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

**No. 77-.....**

ALLIANCE OF INDEPENDENT TELEPHONE UNIONS,

*Petitioner,*

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JAMES D. HODGSON, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA AND THE DIAMOND STATE TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, CINCINNATI BELL INC., MICHIGAN BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, INCORPORATED, WISCONSIN TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY AND BELL TELEPHONE COMPANY OF NEVADA, COMMUNICATIONS WORKERS OF AMERICA AFL-CIO, TELEPHONE COORDINATING COUNCIL TCC-1 (NATIONAL BELL COUNCIL) IBEW,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 12, 1977

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Alliance of Independent Telephone Unions respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 22, 1977.

### Opinion Below

The opinion of the Court of Appeals appears in the Appendix hereto and is not yet reported.

The opinion of the United States District Court appears in the Appendix hereto and is reported at 419 F.Supp. 1022 (ED Pa. 1976).

## Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on April 22, 1977. A timely petition for rehearing *en banc* was denied on May 16, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

## Questions Presented

1. Whether the judgment and opinion of the United States Court of Appeals for the Third Circuit, affirming the consent decree and supplemental order of the district court, decided federal questions in a way in conflict with applicable decisions of this court, notably *International Brotherhood of Teamsters* v. *U.S.*, —— U.S. ——, 45 U.S.L.W. 4506 (May 31, 1977); *Trans World Air Lines, Inc.* v. *Hardison*, —— U.S. ——, 45 U.S.L.W. 4672 (June 16, 1977); *United Air Lines, Inc.* v. *Evans*, —— U.S. ——, 45 U.S.L.W. 4566 (May 31, 1977); *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

2. Does Title VII of the Civil Rights Act of 1964, as amended, and Executive Order 11246 sanction the establishment of absolute preference on the basis of race, sex, and/or national origin to fill job vacancies to attain quota levels in each job classification without regard to whether the beneficiaries of such preference are or have been identifiable victims of employment discrimination, and where such preference overrides the qualifications and seniority of incumbent employees, who are not members of the pre-

ferred groups, for promotion or transfer to such job vacancies under *bona fide* collectively bargained seniority systems.

## Statutory Provisions Involved

1. Title VII, Section 703(a), 42 U.S.C. Section 2000(e)-2(a):

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; [July 2, 1964, P. L. 88-352, Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(a)(1)] or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

2. Title VII, Section 703(h), 42 U.S.C. Section 2000(e)-2(h):

> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment

practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1936, as amended (29 U.S.C. 206(d)).

3. Title VII, Section 703(j), 42 U.S.C. Section 2000(e)-2(j):

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

4. Title VII, Section 706(g), 42 U.S.C. Section 2000(e)-5(g):

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

5. Title VII, Section 715, 42 U.S.C. Section 2000(e)-14:

> "There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United

States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section."

**Executive Order 11246 (Provisions Involved)**

(30 C.F.R. 12319, effective October 24, 1965; Executive Order 11375, signed October 13, 1967, 32 C.F.R. 14303, amended E.O. 11246 by substituting "religion" for "creed", and adding "sex" as a prohibited type of discrimination)

"Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

'During the performance of this contract, the contractor agrees as follows:

'(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees

are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

'(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

'(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

* * * * *

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the

implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

* * * * *

Subpart D—Sanctions and Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964."

* * * *

## Statement of the Case

On January 18, 1973 the Equal Employment Opportunity Commission (EEOC), Secretary of Labor, and the United States filed a complaint in the district court, charging the American Telephone and Telegraph Company and its associated operating companies (collectively, AT&T) with having engaged in discriminatory employment practices against women, blacks and other minorities in violation of Title VII of the Civil Rights Act of 1964, as amended, Executive Order 11246, and the Fair Labor Standards Act. In its answer, filed the same day, AT&T denied these charges.

This action grew out of the intervention by EEOC in a 1970 telephone rate increase proceeding filed by AT&T with the Federal Communications Commission, wherein EEOC sought to prevent any rate increase unless AT&T adopted a suitable affirmative action program to counteract the effects of the alleged employment discrimination. Testimony on such allegations was taken by the FCC. AT&T and EEOC were meanwhile negotiating on an affirmative action program.

Simultaneously with the filing of the complaint and answer in the district court, the government parties and AT&T consented to a decree embodying an agreement among them on a model affirmative action program. This consent decree was on the same day approved and signed by the district court.

The Unions representing the various bargaining units of employees of AT&T and its associated operating companies, namely, Alliance of Independent Telephone Unions

(Alliance), Communications Workers of America (CWA), and Telephone Coordinating Council TCC-1, National Bell Council of the International Brotherhood of Electrical Workers (IBEW), were not parties to the consent decree.

To protect their interests in the operation and enforceability of the seniority systems contained in various collective bargaining agreements with AT&T and its associated operating companies from being overridden by the terms of the consent decree, the Unions moved to intervene in *EEOC et al.* v. *AT&T*. CWA's motion, at first denied, was ultimately granted. See 365 F.Supp. 1105 (E.D. Pa., 1973), modified 506 F.2d 735 (3rd Cir., 1974). The motions of the Alliance and IBEW to intervene were granted in July, 1975.

The district court had then to decide a number of petitions before it. The Unions petitioned to modify the consent decree to preserve the seniority and qualification rights of incumbent employees for promotions or transfers to job vacancies under applicable contractual seniority provisions from being overridden by the consent decree preferring for these job vacancies members of "underutilized" groups, who had neither the seniority nor the qualifications possessed by the overridden incumbents and who were not actual victims of employment discrimination. In addition, CWA sought a preliminary injunction restraining the operation of the consent decree pending a determination of the petitions to modify. IBEW also moved for summary judgment.

On their part, EEOC and AT&T petitioned the district court to enter a proposed supplemental order designed

to correct deficiencies in the 1973 and 1974 implementation of the consent decree by AT&T.

On August 20, 1976 the district court denied all of the Unions' petitions and granted the petition of EEOC and AT&T (419 F.Supp. 1022).

The Third Circuit Court of Appeals affirmed the judgment and orders of the district court on April 22, 1977, and on May 16, 1977 denied the Unions' petition for rehearing *en banc*.

The consent decree established fifteen job classifications of which numbers 5 through 15 encompassed non-management, i.e. bargaining unit, jobs. Of these, some were designated "entry level", others "semi-skilled", still others "skilled".

The decree required intermediate targets and ultimate goals (i.e. quotas) to be reached within prescribed time periods to the end that each job classification would contain a racial, sex and ethnic employee population mix reflecting the racial, sex and ethnic population mix in the respective operating company's external labor market.

If a particular job classification failed to meet its intermediate target within a prescribed time period, the employer "must then pass over candidates with greater seniority or better qualifications in favor of members of the underrepresented group who are at least 'basically qualified' " (App. p. 8).

The consent decree did not limit the override of seniority and qualifications under contractual seniority provisions to actual victims of employer discrimination, who are members of an underutilized preferred group, to make such

victims whole by placing them in their rightful place on the seniority roster. Nor did the consent decree distinguish between pre-Act and post-Act discriminatees.

Since AT&T failed in a number of instances to meet the established quotas within the 1973 and 1974 time periods, it agreed with EEOC on a proposed supplemental order designed to correct the deficiencies and to avoid future ones. It was approved and became part of the district court's order which the Third Circuit Court of Appeals sustained.

The supplemental order was more specific than the consent decree on the override requirements. It "articulated" in Part IV entitled the "Affirmative Action Override" (App. p. 159) the concept that "to the extent that any provisions of the [collective bargaining agreements] would prevent the achievement of the affirmative action targets and goals, the decree controlled" (App. p. 10).

The carry forward procedure of the supplemental order contained in Part I thereof (App. p. 145) established a procedure for overriding the greater contractual seniority and qualifications of incumbent employees, who were not members of the preferred groups, to attain the quotas in each job classification where the 1973 deficiencies failed of such achievement. It gave absolute preference to members of underutilized groups who had on file in 1973 applications for employment, promotion or transfer, regardless of whether such persons were actual victims of employment discrimination. The talisman for preference was being a member of an underutilized group.

The seniority system in various collective bargaining agreements with AT&T associated companies has been de-

scribed as generally providing, both before and since 1964, for promotion of the best qualified employee to a job vacancy (i.e. merit); if the qualifications of two or more employees are substantially equal, the one with greater company-wide seniority (net credited service) will get the promotion (affidavit of Oliver Taylor, AT&T Director-Labor Relations, App. p. 194, 195).

The courts below have not found that the seniority provisions are other than *bona fide,* equally applicable regardless of race, sex, religion, ethnic origin, etc. Nor has there been any finding that these seniority provisions have been created with any intention to discriminate on the basis of race, sex, religion, ethnic origin, etc.

The court below, in referring to the seniority provisions, gratuitously stated that " . . . it is clear that the company has not bargained to the union any role in the determination of employee qualifications" (App. p. 11). This statement has a surface accuracy only in so far as any initial determination is involved, but through the grievance procedure, and also (in a number of contracts) in binding arbitration, the unions have an effective role in challenging and changing the company's initial determination. There have been reported arbitration decisions in which promotions based on company determination of employee qualifications have been successfully challenged by the unions involved. See e.g. *Matter of Southern Bell Telephone Co.,* 16 LA 1 (1951);[1] *Matter of AT&T Co.,* 25 LA 256 (1955); *Matter of New Jersey Bell Telephone Co.,* 47 LA 495 (1966); *Matter of South Central Bell Telephone Company,*

[1] "LA" reports are Labor Arbitration Cases published by the Bureau of National Affairs.

60 LA 465 (1973); *Matter of Mountain States Telephone Co.*, 64 LA 316 (1974); *Matter of Southwestern Bell Telephone Co.*, reported in Stone and Baderschneider, *Arbitration of Discrimination Grievances*, p. 57 (American Arbitration Association, 1974).

During 1973 and 1974, AT&T operating companies resorted to the override provisions of the consent decree to attain quota levels in the job classifications on 28,856 occasions (affidavit of Donald Liebers, AT&T Personnel Director and Table I thereto annexed, App. p. 198). Since the consent decree did not confine its remedial scope to identifiable victims of discrimination, there is no indication whether, if at all, any of the overrides were to make whole any identifiable victims of employment discrimination.

The decision of the court below, sustaining the seniority override provisions of the consent decree and supplemental order, was grounded on the authority which Section 706(g) of Title VII gives to a district court to order appropriate action after it finds that a respondent engaged in unlawful employment practices. The court below relied on *Franks* v. *Bowman Transportation Co., supra,* as foreclosing the argument that Sections 703(a), (h) and (j) prohibited affirmative action override of seniority systems in collective bargaining agreements. It further found in Executive Order 11246 sufficient breadth "to justify relief directed at classes rather than individual victims of discrimination" (App. p. 17).

The basis for federal jurisdiction in the United States district court, the court of first instance below, is Sections 706(f) and 707(e) of Title VII, Civil Rights Act of 1964, 42 U.S.C. Section 2000(e)-5(f), 6(e), and 28 U.S.C. Sections 451, 1343, 1345.

## Reasons for Granting the Writ

### (A)

The judgment and opinion of the court below decided federal questions in conflict with applicable decisions of this court, particularly *International Brotherhood of Teamsters* v. *United States,* —— U.S. ——, 45 U.S.L.W. 4506 (May 31, 1977); *Trans World Airlines* v. *Hardison,* —— U.S. ——, 45 U.S.L.W. 4672 (June 16, 1977); *United Air Lines, Inc.* v. *Evans,* —— U.S. ——, 45 U.S.L.W. 4566 (May 31, 1977); *Franks* v. *Bowman Transportation Co., Inc.,* 424 U.S. 747 (1976); *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), and should be reversed and corrected.

The decision of the court below conflicts with the above decisions of this court in the following essential areas:

1. It overrides bona fide contractual seniority systems and makes them inoperable to the extent overridden, whereas *Teamsters, Hardison,* and *Evans, supra,* make clear that such seniority systems are protected by Section 703(h) of Title VII and that their "routine application" is lawful.

*Teamsters,* 45 U.S.L.W. at p. 4513:

> "[T]he unmistakeable purpose of Section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."

*Hardison,* 45 U.S.L.W. at p. 4677:

> "Thus, absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."

*Evans,* 45 U.S.L.W. at p. 4568:

> "[Section 703(h)] expressly provides that it shall not be an unlawful employment practice to apply different terms of employment pursuant to a bona fide seniority system, provided that any disparity is not the result of intentional discrimination."

Here, there has been no contention that the contractual seniority systems are other than bona fide. They were not established to discriminate, and they apply equally to all employees regardless of race, sex or ethnic origin. The criterion of seniority (net credited service) is no less than company-wide. It is not limited to any particular department or location. It does not "lock in" any employee in the exercise of seniority within any confined segment of any company. In this respect, the seniority system here involved is broader and less restrictive than that which this court, in *Teamsters,* found to be protected under Section 703(h).

The court below purported to find a departmental limitation of the seniority system in the "best qualified" criterion. It saw "experience in a department" as bearing upon the "best qualified" guideline. *Teamsters* find no unlawful feature in a seniority system being department-wide or bargaining-unit wide. Moreover, the coupling of qualifications with seniority (if qualifications are substantially

equal) is a customary hallmark of the vast majority of seniority-in-promotion provisions to be found in collective bargaining agreements and, so long as such coupling is not for discriminatory purposes, it does not serve to deny this vast majority of seniority clauses Section 703(h) protection. Nine-tenths of the seniority-in-promotion clauses provide for seniority being combined with other factors, such as ability, skill, or "qualifications" not otherwise defined. See *Major Collective Bargaining Agreements,* "Seniority in Promotion and Transfer Provisions" (Bulletin 1425-11), U.S. Department of Labor, BLS (March, 1970), pp. 7, 10. See also footnote 12 of *Teamsters.* There is no contention that the criterion of qualifications (even if affected by experience, which itself is the result of seniority) drained the contractual seniority system here involved of their bona fides. To the extent that "qualifications" control promotion opportunities under the collective bargaining agreements, they do so for all. Further, Section 703(h) protects equally "merit system[s]" and seniority systems.

Since, under *Teamsters, Hardison* and *Evans,* the "routine operation" of the bona fide seniority systems here involved are "not unlawful under Title VII'" and "cannot be an unlawful employment practice" under the provisions of Section 703(h), it is clear that to override them and to make them inoperable to the extent of the override would strip them of their lawful and operable status under Section 703(h). The decision of the court below, however, did this and should be reversed.

2. The court below ordered preferential promotion treatment to underutilized groups to attain quota levels in each job classification. It expressly rejected directing relief

only to the identifiable victims of employment discrimination by AT&T. *Teamsters* and *Franks, supra,* made clear that the central objective of Title VII is to "make whole" identifiable victims of employment discrimination by restoring them to their rightful place on the seniority roster, rather than to create a whole new group of victims* by subordinating the earned seniority and qualifications of innocent incumbent employees to the promotion preferences granted members of an underutilized group, regardless of their status as discriminatees.

In discussing the "most complete relief possible", *Franks* described such relief as that which restored, so far as possible, persons aggrieved by the consequences of discrimination to the position (rightful place) they would have occupied absent the unlawful discrimination. 424 U.S. at pp. 763-764. This was the theory of relief which carried out the central objective of Title VII. See Brest, *In Defense of the Antidiscrimination Principle,* 90 Harvard Law Review 1, 37, 41 (Nov. 1976).

One of the major concerns expressed by both the majority and minority in *Franks* was the extent to which incumbent employees, innocent of any wrongdoing, would be subordinated in the exercise of their seniority rights to minority group members granted affirmative action relief. The majority of the court saw fit to subordinate such rights of incumbent employees only to the extent that identifiable victims of the employer's discrimination would be "made whole" for such discrimination by being restored to the

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* It is respectfully submitted that any senior qualified employee who would have obtained a promotion or transfer but for the quota override is now a victim only because he or she is of the *wrong* race, sex, or national origin.

position they would have been in if they had not suffered the discrimination. This, said the majority in *Franks,* carried out "the central 'make-whole' objective of Title VII", 424 U.S. at p. 774.

There is nothing in *Franks* to suggest that an innocent incumbent's seniority rights would or should, under Title VII, be subordinated, in addition to the make-whole remedy afforded discriminatees, also to non-victim members of underutilized groups to attain quota levels in each job classification.

Section 703(j) is strong indication that Title VII does not require giving minority employees enhanced promotional treatment on the basis of race, sex, or national origin merely because *others* of the same group have been victims of employment discrimination. Treating such employees differently for purposes of promotion solely because of their race, sex, or ethnic origin, when they have not themselves suffered individual discrimination by the employer, amounts to preferential treatment proscribed by Section 703(j) and by Title VII generally. *McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 280 (1976).

To subordinate innocent incumbents' seniority rights to non-victim employees would only create a new set of victims and this is hardly the purpose of Title VII. In *Hardison,* this court stated, 45 U.S.L.W. at p. 4674:

> "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin. This is true regardless of whether

> the discrimination is directed against majorities or minorities. *McDonald* v. *Santa Fe Transportation Co.*, 427 U.S. 273, 280 (1976). See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1973)."

The overriding group preference of underutilized groups, regardless of the victim status of the beneficiaries, which the court below sanctioned, has the effect of going beyond "making whole" identifiable victims of the employer's discrimination and "makes better" non-victims to the detriment of the seniority and qualifications rights of innocent incumbent employees under a *bona fide* seniority system.

*Teamsters* fortified the conclusion, enunciated in *Franks*, that Title VII relief encompasses the "make-whole", not the "make better" scope of relief that blind* group preference entails. Thus, in footnote 61, 45 U.S.L.W. at p. 4519, *Teamsters* noted that Section 703(j) "provides only that Title VII does not require an employer to grant preferential treatment to any group in order to rectify an imbalance between the composition of the employer's work force and the make-up of the population at large" (emphasis supplied).

If, after *Franks*, there was any doubt as to the scope of relief, *Teamsters* clarified that "only specifically identifiable post-Act victims would be entitled to relief because only they had been the victims of unlawful discrimination." Copus, *Impact of Title VII Rulings On Business*, New York Law Journal, July 15, 1977, p. 1, col. 2-4, on p. 20, col. 1. This is clearly apparent from the directions *Teamsters* gives to lower courts in determining actual victims

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* Blind in the sense that the Consent Decree and Supplemental Order are blind to whether or not the beneficiaries of the quota remedy were identifiable victims.

of discrimination to make them whole, and in balancing equities. 45 U.S.L.W. at p. 4518.

The court below, however, saw in the achievement of quota levels in each job classification mirroring the population mix of the labor market, sufficient basis for sustaining group preference that would override *bona fide* seniority systems.

But, in footnote 20, 45 U.S.L.W. at p. 4510, *Teamsters* speaks of "an *erroneous theory* that Title VII requires an employer's work force to be racially balanced." And further in the same footnote, this court said that: "Evidence of long-lasting and gross disparity between the composition of a work force and that of the general population thus may be significant *even though Section 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population*" (emphasis supplied).

Obviously, if a *bona fide* seniority system may be overridden to achieve a quota level in each job classification (euphemistically termed "numerical remedies"), the seniority system would be subordinated to that purpose, and the seniority and qualifications rights of innocent incumbent employees would in turn be subordinated to the promotions preferences ordered for non-victim members of underutilized groups to attain a "numerical remedy". This would rob the *bona fide* seniority system of the protection and lawful operative status which this court, in *Teamsters,* ruled was provided by Section 703(h).

3. Therefore, to the extent that *bona fide* seniority systems are protected by Section 703(h) and to the extent that relief is limited to identifiable victims of employment dis-

crimination under Section 703(j), the discretionary remedial authority of the district court to fashion affirmative action relief under Section 706(g) is limited. See also *Teamsters,* 45 U.S.L.W. at p. 4516 where this court stated that "Analysis of this problem must begin with the premise that the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act."

Since this court has held that the routine operation of a *bona fide* seniority system is not an unlawful employment practice under Title VII, there is no authority, under Section 706(g), in a district court to fashion an affirmative action program that overrides the lawful seniority system and makes it inoperable to the extent overridden.

**(B)**

The court below, relying on Executive Order 11246, found therein an instrument for broader relief "entirely apart from Title VII" (App. p. 17).

We submit that E.O. 11246 does not expand upon the substantive scope of relief affordable under Title VII, and does not make legitimate relief which not only is proscribed by Title VII but which also raises, in the instant case, constitutional questions of reverse discrimination.

While it may be "a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors" (App. p. 16-17), that valid effort hardly encompasses making victims of innocent incumbent employees by denying them promotions under *bona fide* contractual seniority-and-qualifications provisions, in order to provide promotion

preferences for non-victims of employment discrimination merely because of the latter's race, sex or national origin. Certainly, a fair reading of Section 202 of E.O. 11246 does not lend itself to that result. The language appears, instead, to lend itself to conclusions reached by this court in *Teamsters* and *Hardison, supra* (e.g. Section 202(1): "The contractor will take affirmative action to ensure that . . . employees are treated during employment, without regard to their race, color, religion, sex or national origin . . ."). Would *Hardison* have had a different result if the employer happened to have been a government contractor?

Section 209 of E.O. 11246 makes a number of methods for its enforcement available to the Secretary of Labor: publishing the names of contractors or unions failing to comply with the Order's provisions, or recommending that the Justice Department take appropriate proceedings to enforce Section 202 of the Order, or recommending that the EEOC or the Justice Department institute appropriate proceedings under Title VII. Thus, while Section 209 sets forth a number of procedures as "Sanctions or Penalties", they are clearly in *pari materia* to attain the same substantive result, not inconsistent results. Section 209(a)(2) limits all enforcement proceedings to being "within the limitations of applicable law". The applicable law, obviously, is Title VII and this Court's interpretations of the provisions of Title VII.

The history of E.O. 11246 indicates, not that it embraces different results from those contemplated by Title VII, but that the results are to be consistent.

An Executive Order can only have legal effect to the extent that it is authorized by statute or the Constitution. *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). In *Farmer* v. *Philadelphia Electric Co.,* 329 F.2d 3 (3rd Cir. 1964), the history of the precursor of E.O. 11246, namely E.O. 10925 (March 6, 1961), which contained the substantive provisions later put into E.O. 11246, is set forth. Its authority lay in the Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. Sections 471 *et seq.* and 41 U.S.C.A. Sections 251 *et seq.,* and the Defense Production Act of 1950, 50 U.S.C.A. App. Section 2062. *Farkas* v. *Texas Instrument Co.,* 375 F.2d 629 (5th Cir. 1967), cert. denied 389 U.S. 977, also noted the progenitor of E.O. 11246 in E.O. 10925 and noted, further, that Congress had given the President broad authority "to prescribe such policies and directions, not inconsistent with the provisions of this chapter" (footnote 1, 375 F.2d at p. 632). "This chapter" was chapter 10 of Title 40, U.S.C.A., which deals with procurement.

When Congress was considering the Equal Employment Opportunity Act of 1972, it rejected attempts to have Title VII as the exclusive federal remedy for employment discrimination, 118 Cong. Rec. 3367-3373, 3959-3965 (1972). And it was agreed to continue enforcement of E.O. 11246 by the Department of Labor, 118 Cong. Rec. 1387-1389 (1972).

Although Congress in 1972 maintained enforcement of E.O. 11246, nowhere did it indicate that what was being enforced would call for remedies inconsistent with Title VII. Section 209 of E.O. 11246 does not so indicate.

Indeed, the evidence appears to be to the contrary. Thus, when Section 715 of Title VII was amended [see 118 Cong.

Record 1398-1399 (1972)], it provided for establishing an Equal Employment Opportunity Coordinating Council. This Council was to consist of the Secretary of Labor, the Attorney General, and the respective Chairmen of the EEOC, the United States Civil Service Commission and the United States Civil Rights Commission. Among their stated responsibilities was the responsibility to "eliminate conflict, competition, duplication and *inconsistency* among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and *enforcement of equal employment opportunity legislation, orders, and policies.*" [Section 715, emphasis supplied].

So that, despite various avenues of enforcement approved by Congress in 1972, Congress also clearly intended, by its 1972 amendment of Section 715, to ensure that there would be no inconsistency in the enforcement of equal employment opportunity legislation, *orders,* and policies.

Thus, it was not intended that enforcement of E.O. 11246 and Title VII would lead to inconsistent results. Instead, consistency was the goal.

If, as the court below stated, E.O. 11246 afforded an independent avenue for attaining affirmative action relief, that independent avenue was not designed to attain relief inconsistent with that which this court, in *Teamsters, Franks, Hardison,* and *Evans,* deemed to be the central objective of Title VII. See also Brest, *op. cit.,* 90 Harvard L. Rev. at pp. 48-52. Copus,* *op. cit.,* New York Law Journal, July 18, 1977, p. 4, col. 1, noted:

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* David A. Copus from October 1970 to February 1973 directed the EEOC's investigation of and litigation involving AT&T (App. p. 217).

> "If, as the Supreme Court held, granting relief only to specified individual victims is 'the most complete relief possible', it would be difficult to argue that the Executive Order requires more."

*Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854 (1971), does not call for a contrary conclusion. Not only was it decided before the 1972 amendment to Section 715 called for consistent enforcement of legislation and orders, but the *hiring* quotas there expressly precluded the displacement of incumbent employees. In the case at bar, *promotion* quotas (numerical relief) should likewise preclude subordinating the contractual promotion rights of innocent incumbent employees to promotion preferences on behalf of non-victims of employment discrimination. Post-Act victims, of course, are entitled to be made whole by being restored to their rightful places on the seniority roster.

Finally, we note that, on June 6, 1977, this Court vacated the lower court rulings in the following civil rights cases, all involving the application of seniority systems, promotions, transfers and hiring quotas, 45 U.S.L.W. 3786:

No. 75-220 *Utility Workers Local 223* v. *EEOC,* 515 F.2d 301 (6th Cir. 1975)

No. 75-221 *Electrical Workers Local 17* v. *EEOC,* 515 F.2d 301 (6th Cir. 1975)

No. 75-239 *Stamps* v. *Detroit Edison Co.,* 515 F.2d 301 (6th Cir. 1975)

No. 75-393 *Detroit Edison Co.* v. *EEOC,* 515 F.2d 301 (6th Cir. 1975)

No. 75-788 *Teamsters* v. *Sabala,* 516 F.2d 1251 (5th Cir. 1975)

No. 75-1060 *Western Gillette, Inc.* v. *Sabala,* 516 F.2d 1251 (5th Cir. 1975)

No. 75-838 *Union Carbide Corp.* v. *Nance,* 540 F.2d 718 (4th Cir. 1976)

## CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Dated: August 12, 1977

Respectfully submitted,

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